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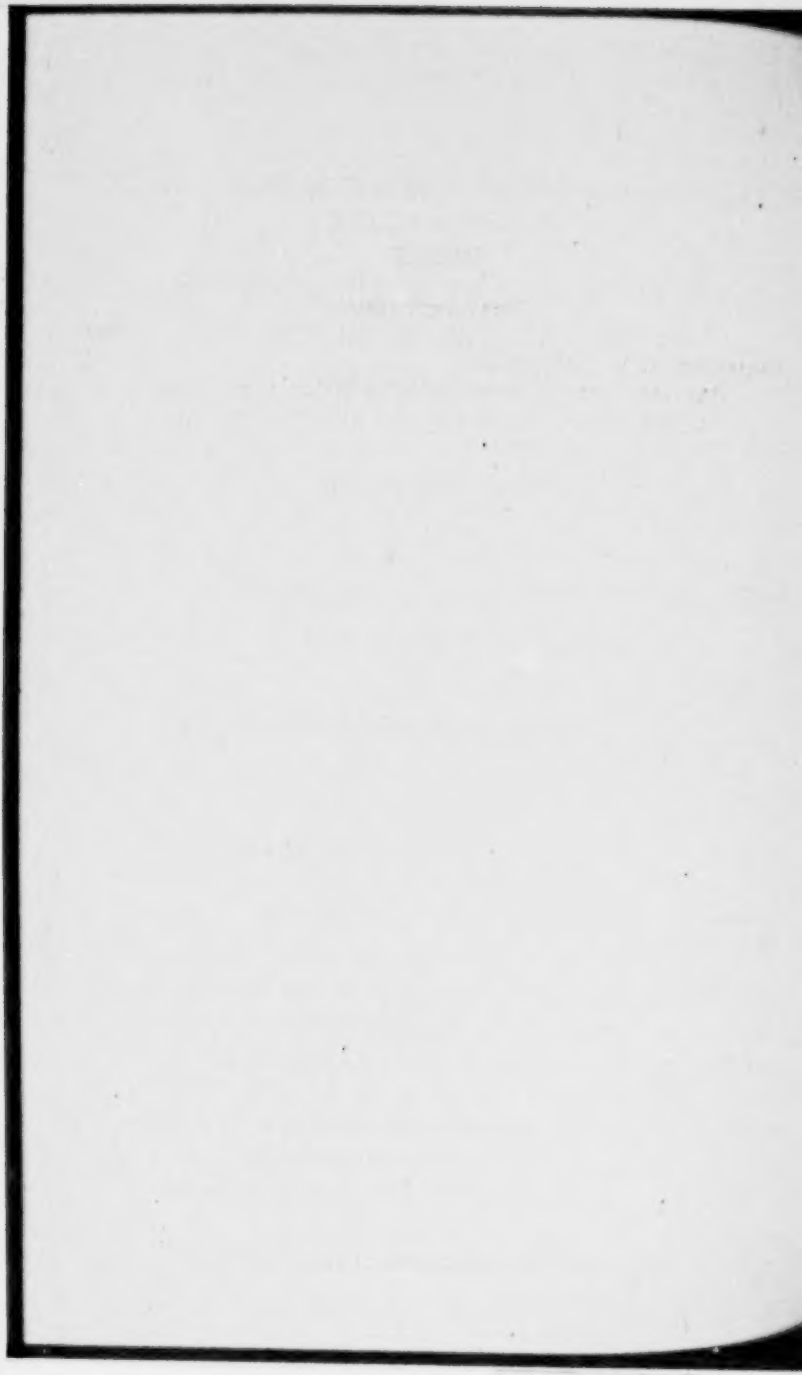

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Jurisdictional Statement Filed in U. S. District Court, September 25, 1948

# IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

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Civil Action No. 834

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BRADY TRANSFER & STORAGE COMPANY, ET AL.,
*Plaintiffs,*

*vs.*

UNITED STATES OF AMERICA, ET AL.,
*Defendants*

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## JURISDICTIONAL STATEMENT

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The jurisdiction of the Supreme Court of the United States in this appeal is conferred by the Deficiencies Appropriation Act of October 22, 1913, 38 Stat. 220, Section 210 of the Judicial Code (28 U. S. C. A. 47a), and Section 238 of the Judicial Code (28 U. S. C. A. 345). The decree appealed from was entered on September 3, 1948, and this petition for appeal is presented on September 25th, 1948.

This is a suit to set aside and enjoin an order of the defendant, Interstate Commerce Commission, entered February 3, 1947, wherein defendant ordered plaintiff to cease

and desist from unspecified motor carrier operations which the Commission held to be unauthorized. This court has ruled upon final hearing that the complaint shall be dismissed on the merits. The foregoing statute provides in such cases for a direct appeal to the Supreme Court of the United States from any decision of a District Court of three judges. *United States* v. *Carolina Freight Carriers Corp.* (1942), 315 U. S. 475, 477.

The questions involved are substantial and novel. Where the Interstate Commerce Commission issues to a motor carrier a certificate authorizing operations as a common carrier over irregular routes between specified points, or within a territory, the carrier thereby acquires a legal right to do business within the scope of its certificate. Nothing in the law limits that right in respect of the amount of business which may be done; and the Motor Carrier Act, 1935 (Section 208(a)), (49 U. S. C. 308(a)), expressly prohibits the imposition of limitations in a certificate upon the right of the carriers to add to its facilities or equipment as the development of the business and the demands of the public require.

In this case, Brady attacks an order of the Commission which requires a cessation or reduction of some of the business which Brady conducts within the territory and between the points which it is authorized to serve under a certificate issued to it by the Commission. The order stems from a decision by the Commission that Brady has operated so intensively and with such regularity pursuant to solicitation of traffic between fixed termini that it has changed its "type of operation" from that of a carrier authorized to do business over irregular routes, even though its operations do not go beyond the limits of the points, territories and highways specified in its certificate. The order is promulgated in part on the theory that such operations must be limited or restricted as a matter of policy in the interest of competing common carriers of property by

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motor vehicle who operate between the same points over regular routes.

If the order is sustained, Brady will be forced to limit the service it renders for the public in the very territory in which its certificate authorizes it to serve as a common carrier, even though the statute defines common carrier as one who holds itself out to the general public to engage in transportation for hire.

In so requiring Brady to limit its service, the report and order of the Commission do not specify what part of its business Brady must forego but it advises plaintiff "at its peril" to determine for itself the limits of its authorized services. To comply with such an order Brady has the uncertain task of determining how much business it can accept. Prudently, it must therefore accept less business than the absolute maximum limit because that limit is not specified and is unknown. To that extent Brady is compelled to forego business which would be its right to accept even if the Commission's were valid. To escape the peril entirely Brady would have to cease operation altogether.

The substantial questions presented relate to the power of the Commission in respect to the following matters:

(a) Does the Motor Carrier Act, 1935, provide or does that Act authorize the Commission to provide for two classes of common carriers of property by motor vehicle, one limited and the other unlimited as to the quantity or method of performing the services which are authorized in the certificates of public convenience and necessity issued to said carriers and specifying the points, territories, highways and commodities to be carried.

(b) Does the Motor Carrier Act, 1935, grant the Commission discretionary power to regulate or limit by classification, or otherwise, the services of common carriers of property over irregular routes for the competitive benefit of other common carriers of property

which are authorized to serve the same points over regular routes.

(c) Does Section 208(a) of the Motor Carrier Act, 1935, specifically withhold from the Commission the power sought to be exercised in its report and order.

(d) When the Commission issues an order limiting and restricting the services which a common carrier of property by motor vehicle may render in the future, said carrier being subject to special penalties for failure to obey such order, is the Commission required to make its order certain and unambiguous, or may it enter a general order which leaves the carrier to determine "at its peril" the precise limitation imposed.

(e) If the Motor Carrier Act, 1935, does grant the authority questioned in (a) above, is said act discriminatory and unconstitutional in violation of the Fifth Amendment of the Constitution.

These questions are novel in that no similar order has ever been entered by the Interstate Commerce Commission in any case involving a common carrier of property by motor vehicle. This case presents the first opportunity to secure a construction of the applicable statutes by the Supreme Court of the United States in such a case. This was a test case in the Commission. The Commission failed to consider substantial and illuminating legislative history providing answers to the foregoing questions on statutory construction; its report contains no reference to such legislative history, although the history of the legislation makes plain that the action of the Commission was contrary to the intent of Congress. The District Court wrote no opinion and expressed no view as to the legislative history which Brady called to its attention.

Since the advent in 1935 of motor carrier regulation by the Commission, repeated efforts were made to deny or cut

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down the operating rights of carriers who operated, prior to regulation, over irregular routes. Yet these operations were expressly saved by Congress in the terms of the Motor Carrier Act, 1935. In its administration of the statute, the Commission at one time sought to limit such carriers through issuance of narrowly restricted certificates, specifying the precise commodities carried before regulation and limiting the future transportation of each commodity to the particular points between which that article had previously been transported.

In the *Carolina Freight Carriers* case, cited above, the Supreme Court condemned this pulverizing of an operation in the granting of certificates based on grandfather operations. It held that the Commission must apply to carriers operating over irregular routes the same tests of substantial operation as were applied in cases involving carriers that operated over regular routes between fixed termini. The certificate issued to Brady was made to conform to that decision of the Court. See also *Howard Hall Co.* v. *United States* (1942), 315 U. S. 495, 498; *Alton R. Co.* v. *United States* (1942), 315 U. S. 15.

The present case is a revival of the effort to restrict future operations of a carrier granted a certificate over irregular routes. If successful here, it may not be doubted that similar orders will be issued against the numerous other carriers having certificates which do not specify regular routes. The end result, and the calculated purpose, of the Commission's action will be to limit future services by these carriers to the restricted repetition of pre-regulation hauls, although this is prohibited by statute and enjoined by the decision in the *Carolina Freight Carriers* case.

These are substantial questions of law upon which this District Court has ruled contrary to the plaintiff's contentions and contrary, we believe, to the construction which

the Supreme Court placed upon the statute in the *Alton, Howard Hall* and *Carolina Freight Carriers* cases.

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BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, WALTER, BURCHMORE & BELNAP,
*Of Counsel.*

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## APPENDIX "A"

OPINION—Filed in U. S. District Court, September 3, 1948

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION

No. 834—Civil

BRADY TRANSFER & STORAGE COMPANY, *Plaintiff*,

*vs.*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Plaintiff*,

and

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Defendant*

Filed September 3, 1948, N. F. Reed, Clerk, by (S.) Gertrude Darrell, Deputy.

APPEARANCES:

Nuel D. Belnap (Walter, Burchmore & Belnap), Chicago, Illinois, and Rex H. Fowler (Bradshaw, Fowler, Proctor & Fairgrave), Des Moines, Iowa, attorneys for Plaintiff.

Gordon C. Locke, Washington, D. C., attorney for the Interstate Commerce Commission.

Edward Dumbauld, Special Assistant to the Attorney General, Gordon C. Locke, Washington, D. C., and Cloid I. Level, Assistant United States Attorney, Des Moines, Iowa, attorneys for the United States of America.

H. F. Gillis, Washington, D. C., attorney for Irregular Route Common Carrier Conference of the American Trucking Associations, Inc., Intervening Plaintiff.

Franklin R. Overmyer, Chicago, Illinois, and Robert J. McBride, Washington, D. C., attorneys for Regular Common Carrier Conference of the American Trucking Associations, Inc., Intervening Defendant.

Before Woodrough and Collet, Circuit Judges, and Dewey, District Judge

COLLET, *Circuit Judge*, delivered the opinion of the Court.

The Plaintiff, Brady Transfer & Storage Company, which will hereinafter be referred to as Brady, carries on extensive operations as a common carrier by motor vehicle under certificates issued by the Interstate Commerce Commission. Bray was so engaged prior to the effiective date of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, 49 U.S.C.A. 301-327 (1947 Cumulative Annual Pocket Part). In due time after the effective date of the above Act, Brady applied to the Commission under the so-called Grandfather Clause, 49 U.S.C.A. 306(a) (1947 Cumulative Annual Pocket Part), for authority to continue the operations then engaged in Pursuant to the authority of the Act, 49 U.S.C.A. 306(a) (1947 Cumulative Annual Pocket Part), Brady continued in the prosecution of its business pending final determination of the foregoing application. Originally the applications made were for several individual certificates. Among those applications authority was requested for the right to operate as a regular route common carrier of freight over specified routes serving specified points in many states and over a large area. After several years several of such regular route certificates were issued. None of them are in controversy in this action. One of the applications that Brady originally made under the Grandfather Clause was for authority to operate as an irregular route common carrier of freight. That application requested among other things authority to operate between St. Paul and Minneapolis, Minnesota, and all points in the State of Iowa. The application was not exactly so worded but for present purposes the question at issue will be simplified by referring to it in that manner. This application had a somewhat hectic course. Originally the Commission, in 1940,

23 M.C.C. 767, issued a report in which the conclusion was stated that Brady had been operating as a common carrier of freight over an irregular route between those points and that specified area, and that the certificate should be granted on that ground. After reconsideration the Commission issued a report denying the irregular route certificate. Subsequent hearings and rehearings finally resulted in the issuance in 1944 of a certificate authorizing among other things irregular route service substantially as requested in the application. In 1937 all of Brady's certificates were consolidated into one. In the meantime, however, in 1941 the Commission instituted on its own motion an investigation to determine whether Brady was actually carrying on an operation between St. Paul and Minneapolis, Minnesota, on the one hand and Spencer and Fort Dodge, Iowa, on the other which exceeded the authority requested in its application for an irregular route between those points. After an extensive investigation by the Commission and participation in the proceedings by many interested parties, all or most of whom have intervened in the present action, the Commission issued its report stating the conclusion that Brady was not carrying on an irregular route operation within the meaning assigned to that term by the Commission and ordering him to cease and desist from exceeding the authority which he had applied for and which had been given him to operate between those points as an irregular route carrier in 1944. The report last referred to was issued in February, 1947. 47 M.C.C. 23. The effective date of this order has been extended from time to time, permitting the bringing of this action and has, since the action was brought, been further extended at the request of and for the convenience of the Court to permit the disposition of this action before the effective date of the order.

This action is brought under 28 U.S.C.A. 41(28), 43, 44, 45(a), 47, and 48, challenging the validity of the Commission's order directing Brady to cease exceeding its irregular route authority between St. Paul and Minneapolis, Minnesota, and Spencer and Fort Dodge, Iowa. The usual statutory three-judge Court was convened and the cause submitted upon the pleadings, stipulation and affidavit. The

material facts are not in dispute. Brady concedes, for the purposes of this case, that the evidence before the Commission supports its factual findings in which the operations conducted by Brady are described. Brady does not concur, however, in the conclusion of the Commission that those facts demonstrate an exercise of authority in excess of that granted and possessed by Brady under the irregular route certificate. A brief outline of the factual situation will materially clarify the legal differences now in dispute.

As heretofore noted, Brady was operating extensively as a motor carrier of freight prior to 1935. Incident to those operations occasions presumably arose, again presumably comparatively infrequent, for Brady in its capacity as a common carrier, holding itself out to the public as ready, able and willing to carry freight anywhere, for it to transport freight from St. Paul and Minneapolis to indiscriminate points in Iowa. We say "presumably" because that kind of an operation is the type of business which historically and customarily provoked the type of application which Brady filed—a request for irregular route authority between St. Paul and Minneapolis on the one hand and all points in Iowa on the other. Again, presumably, Brady was not operating between St. Paul and Minneapolis on the one hand and all points in Iowa on the other at that time or any time nor was it necessary for it to be so operating in order to justify the application for and the issuance of a certificate as an irregular route carrier. Alton Railroad Company *v.* United States, 315 U.S. 15, 21 (1942). As time went on Brady saw the opportunity of increasing materially the volume of business and the profits resulting from its operation by the establishment of regular scheduled trips, the solicitation of business between St. Paul and Minneapolis and Spencer and Fort Dodge, Iowa, the advertisement to the general public, and the solicitation of shippers upon the basis that regular scheduled daily service was offered between St. Paul and Minneapolis on the one hand and Spencer and Fort Dodge, on the other. Considerable business was built up as the result. The Commission concluded that this new systematic, regular scheduled service given by Brady between St. Poul and Minneapolis on the one hand and

Spencer and Fort Dodge on the other constituted a change in the *type* of the operation which Brady had been giving prior to 1935 and which it had requested authority to continue under the Grandfather Clause and which it had been granted authority to continue by the issuance of the irregular route certificate. That conclusion was based upon the consideration of eight factors set forth in the Commission's extensive report. 47 M.C.C. 23, 43-56 (1947). The Commission expressly disavows any intent to curtail the volume of Brady's irregular route business between these points. With equal clarity and positiveness it renounces any intent or power to curtail the number of trips which Brady makes between St. Paul or Minneapolis and Spencer or Fort Dodge under the irregular route certificate. It states in its report, (47 M.C.C. 23) (1947), in the language of the experts in that field, with a meticulous care as to terminology which we will not undertake to emulate or improve upon for the very good reason that it is not within the province of this Court to do so, why the present operations by Brady as demonstarted by the conceded facts represent a change in the *type* of its operations from those of an irregular route carrier to those of a regular route carrier.

The question of primary importance presented in this case is stated by Brady in its brief as follows:

> Does the term "irregular routes" as used by the Commission in the Brady certificate constitute a specification only of the highways which the carrier is authorized to traverse—any and all available highways—, or does it mean more and constitute a limitation on service and a prohibition of certain operating practices, so that the Commission can now require Brady to refrain from such practices on the ground that they are not authorized by the initial grant.

As amplified in the argument, this contention amounts to an assertion that the service given by Brady prior to the effective date of the Motor Carrier Act and which was made the premise of the application for the irregular route certificate under the Grandfather Clause of that Act is relevant only to the determination of the area or points which may

be served under the irregular route certificate, with the result that after the issuance of the irregular route certificate granting authority to operate between a given point or points and a specified area or points therein the quantity of such service may be increased under the authority of 49 U.S.C.A. 308(a) (1947 Cumulative Annual Pocket Part) [1] to an unlimited extent with such improvements in service as an increase in the quantity of service may make appropriate, although those refinements and improvements may convert a one-time coincidental operation between St. Paul and Minneapolis on the one hand and Spencer and Fort Dodge on the other into a regular, periodical, scheduled, systematic, "regular route" operation between those points.

The further objections to the validity of the Commission's order are advanced to the effect that (1) the Commission does not have the power to impose the limitations asserted to have been made; (2) the Motor Carrier Act does not recognize or permit the classification of common carriers of property into irregular route carriers and regular route operations; (3) the classification section of the Act, 49 U.S.C.A. 304(b) (1947 Cumulative Annual Pocket Part), does not give the Commission power to classify common carriers of property into the above classes; (4) the Commission does not have the power to restrict the service of an irregular route common carrier for the purpose of improving the competitive position of regular route carriers; and (5) the assailed order violates the due process clause of the Fifth Amendment in that it (a) is invalid for uncertainty, and (b) is discriminatory because it imposes a classification with accompanying restrictions upon irregular route operators without any reasonable relation to the purpose of the Act. These further contentions will largely be answered by the determination of the more important question above stated.

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[1] "• • • Provided, however, That no terms, conditions, or limitations (in the certificate) shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

The basic underlying dispute in this case is whether Brady has simply increased the quantity of the service it is authorized to give under its irregular route certificate or whether, as the Commission concluded, it has changed the *type* of its operation from that of an irregular route carrier to that of a regular route carrier. For it cannot be seriously contended that the Act of Congress does not contemplate two types of common carriers i. e. irregular route carriers and regular route carriers. U. S. v. Maher, 307 U. S. 148, 155; Crescent Express Lines, Inc. v. U. S., 320 U. S. 401. It is true that the cases just cited deal with the carriage of passengers but we see no valid reason why the principles announced by the Supreme Court in those cases should not apply equally to the carriers of property. Nor can there be serious doubt that Congress granted to the Commission the authority to classify common carriers of property and a fortiori the right to establish the classifications of irregular route carriers and regular route carriers, if, of course, there be a reasonable factual basis therefor, since Congress specifically conferred that power by Section 304 (b), 49 U.S.C.A. (1947 Cumulative Annual Pocket Part) as follows:

> The Commission may from time to time establish such just and reasonable classifications of groups of carriers * * * as the special nature of the services performed by such carriers * * * shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this chapter, to be observed by the carriers * * * so classified or grouped, as the Commission deems necessary or desirable in the public interest.

With the premise established that the Commission has the power to classify common carriers of property, our inquiry leads to the determination of the question of whether that power was properly exercised by the classification of common carriers of property into irregular route and regular route operators. It is reasonably clear from the Act itself that Congress recognized a necessity for dis-

tinguishing between these two *types* of operators [2] but it is apparent from the specific authorization which Congress conferred upon the Commission to classify carriers that it —the Congress—was not undertaking to actually make the classification but preferred to leave that to the considered judgment of the experts in that field.

Was the classification a reasonable one and based upon a justifiable factual difference between these classes of operators? The answer to that question depends somewhat upon a consideration of what has historically been the manner of operation of an irregular route carrier and regu-

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[2] 49 U.S.C.A. 303(a)(14) "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, *whether over regular or irregular routes*, except * * *" (Emphasis supplied).

49 U.S.C.A. 304(b) quoted *supra* in the body of this opinion.

49 U.S.C.A. 306(a) "Except as otherwise provided in this section and in section 310a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 310, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, *over the route or routes or within the territory for which application is made and has so operated since that time*, Or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, * * *" (Emphasis supplied).

49 U.S.C.A. 308(a) "Any certificate issued under section 306 or 307 shall specify *the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate;* and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Section 304(a)(1) and (6): * * *" (Emphasis supplied).

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lar route carriers prior to the passage of the Motor Carrier Act of 1935 and at the time the Commission made its classification of those carriers by general order in 1937.[3] The distinguishing characteristics between the irregular route carrier and one possessing regular route authority were not stated with meticulous nicety in the classification order of 1937, and apparently not until the present case was decided by the Interstate Commerce Commission did that body undertake to set out any extensive formula for making the distinction between the types. And then it disavowed, and we think very properly, the intention or even the possibility of laying down any hard and fast inelastic yardstick which could be applied to all cases for the determination of what class a particular operation fell into. It did in its report in this case announce eight factors or criteria, some or all of which might in an individual case exist and have a relevant bearing on the determination of the type of operation. It is clear from the Commission's order that there was no intention to assert that any one of those eight factors would necessarily be controlling. On the other hand, it is equally clear that the Commission was undertaking to give such assistance as it could to the industry in announcing these factors in order that so many of them as might exist in any given case might be considered collectively in determining the type of operation. It is unnecesary to restate these factors in detail. The salient portions thereof are set forth in the margin.[4] They do not constitute any new

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[3] Classification of Motor Carriers of Property, 2 M.C.C. 703 (1937).

[4] "*Predetermined plan.*—Regular-route operation when once established is repetitive in character and in its over-all aspects is essentially operation according to a predetermined plan as contrasted with operation strictly on-call, as demanded and where demanded. This does not, however, mean that the plan in all its details must have been considered before the operation was herein. On the contrary, as already indicated, it is frequently the result of an evolutionary process. The significant thing is that from day to day and week to week the pattern of a regular-route operation is fixed to a degree inconsistent with a bona fide on-call anywhere-for-hire service."

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"*Character of Traffic.*—Irregular-route call-or-demand carriers are all classified in some States as contract or private carriers, rather than as

definition of an irregular route carrier, but merely enunciate the historically established differences in the type of operations long known and recognized by the industry and by Brady at the time it made original application for different types of certificates. The general criteria which the Commission has laid down as a basis for the classification of common carriers by type are in our judgment based upon abundant factual premises stated in the factors themselves. We conclude, therefore, that the classification was a reasonable one fully authorized by well recognized principles of law and the Act in question. Brady concedes the correctness of the facts found by the Commission and set forth in

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common carriers, because normally they cater to fewer shippers and respond only to calls for the movement of truckload lots or other substantial shipments. In contrast commmon carriers operating according to a predetermined plan over regular routes between commercial centers or from distribution points into consuming areas are the logical carriers of aggregated lots of miscellaneous less-than-truckload shipments, and regularly serve a great number of shippers. Thus the consistent day to day transportation in volume of aggregated lots of numerous less-than-truckload shipments is more a characteristic of regular route, than of irregular route, carriers. This is true notwithstanding the fact that irregular-route carriers, who operate to and from a recognized base area, frequently solicit and accept less-than-truckload shipments particularly in making up return loads."

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"*Solicitation.*—The greater acceptability of less-than-truckload shipments to regular-route, than to irregular-route, carriers, just discussed, and the dependency of the former on a constant and continuing volume of traffic reflects itself in solicitation by regular-route carriers which differs from that generally indulged by those who operate over irregular-routes. The solicitation of the latter is generally less intense and as a rule more selective. Such carriers do not try to reach the same number of shippers as do regular-route carriers. Thus employment at the principal points served of one or more full-time solicitors whose duty it is regularly to call upon as many shippers as possible for the purpose of soliciting shipments both less-than-truckload and truckload is more characteristic of regular—than irregular-route carriers."

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"*Terminals and call stations.*—Although the maintenance by an irregular-route carrier of a terminal or terminals at points other than its principal base is permissible under the act, *J. Miller Co. Common Carrier Application,* 42 M.C.C. 709, many such carriers maintain no terminals at points

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its report and order but contends that actually all of the factors considered by the Commission in reaching its conclusion that Brady had changed the type of its operation were factors originating out of an increase in the *quantity* of its operation, as distinguished from *type*, and hence the application of those factors is prohibited by the limiting provisions of 49 U. S. C. A. 308(a) (1947 Cumulative Annual Pocket Part) heretofore quoted in footnote 1 supra. With that contention we cannot agree. It is unnecessary in view of the careful and full consideration given to the question by the Commission and reported in its report and order, for us to amplify at length the difference in the type of

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other than their respective bases and have no representation and no telephone listing except at such bases. Some of them using the telephone number of some non-competitive carrier, gasoline service station, or similar establishment, arrange a telephone listing in their own name and so establish a so-called call station at which requests for service may be left. Regular-route carriers, on the other hand, if their operations are at all substantial, find the maintenance, at the principal points served, of terminals at which less-than-truckload shipments may be assembled, sorted, and loaded into line-haul equipment, a virtual necessity. Unquestionably the maintenance of terminals at a point other than the carrier's base coupled with the consistent movement of a substantial volume of less-than-truckload shipments, strongly suggests an operation of fixed regularity and according to plan rather than call-on-demand."

* * * * * * *

"*Fixed routes.*—The adherence to fixed routes is, of course, the outstanding characteristic of regular-route carriers, but this does not mean that rigid and inflexible use of a particular route or routes is imperative to the status of a regular-route carrier. Recognizing this, the Congress in section 208(b) of the act specifically provided that a common carrier 'may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate * * * under such rules as the Commission may prescribe.' As already indicated, many regular-route services are the outgrowth of irregular-route operations which have gravitated in the channels of the greatest traffic. In the course of such evolution, a regular-route service is achieved, if its other elements are present, when the use of a particular route or routes becomes habitual and customary even though departures therefrom are freely made whenever to the carrier's advantage. This does not, however, mean that the habitual and frequent, even daily, use of a particular route between certain points by a carrier authorized to operate only over irregular routes is necessarily unlawful. Such considerations as the geographic situation, the length of the route, other available routes, the character of the traffic,

operation which the Commission found Brady was now engaging in from the type of operation which it was performing prior to June 1, 1935, which was made the basis for its application for the irregular route certificate under the Grandfather Clause and which was the premise for the issuance of that authority. We deem it adequate to observe that there is, as the Commission found, a clear distinction in type between the indiscriminate coincidental, nonscheduled, unperiodical, itinerant, ambulatory service of an irregular route carrier and the operation of a regular route certificate holder over a carefully specified route to only

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the number of shippers served, and possibly others would affect the conclusion. Although they are definitely the exception rather than the rule, it is easy to conceive of a bona fide irregular-route carrier being engaged primarily in the daily transportation of the products of a particular plant which is so located as to require the repeated use of certain routes. Or such a carrier may be engaged in interplant operations for a single shipper such that economy of operation and expedition dictate the regular use of certain highways. In such instances the existence of a regular-route operation, as that term is used in certificates or permits issued under Part II of the act, is clearly negatived by other considerations which outweigh the repeated use of the same routes."

• • • • • • •

"*Fixed termini.*—Fixed termini go with fixed (regular) routes and necessarily characterize every regular-route operation. That they may also in exceptional cases mark bona fide irregular-route operations is apparent from the immediately preceding discussion but, notwithstanding, it is clear that when the regular—or irregular—route status of a particular operation is in issue the fact that it is between fixed termini is particularly significant. This is especially true where, as here, the considered termini are widely separated, where a variety of routes are available between them, and where adherence to a particular route has not been without exception."

• • • • • • •

"*Periodicity of service.*—As above stated, regular-route service is repetitive in character. It is necessarily marked by such periodic recurrence, as to become fixed in a pattern which is known to the public in contrast to on-call service which depends for its design wholly on the day to day needs of individual shippers. Regular-route service does not, however, depend upon the interval between offerings. Daily service is common but not necessarily the rule. Not infrequently regular-route 'grandfather' rights have been granted on proof of only two or three services weekly over claimed routes. The essential thing is a service of such fixed and definite periodicity that it becomes known to and is relied upon by shippers and consignees generally. Where, however, daily service is shown it is

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specifically authorized points on that route on schedules published and filed, with the obligation on the part of the carrier to give, and the responsibility on the part of the Commission to compel, the carrying out of that operation to such an extent as the convenience and necessity of the public justified. The decision reached by the Commission to the effect that Brady's systematically, periodically, scheduled, non-coincidental, premeditated, planned, regular service between St. Paul and Minneapolis on the one hand and Spencer and Fort Dodge on the other was a regular

---

obvious that it is strong evidence of a regular-route operation. A continuing course of daily service for a long time between specific points over substantially the same routes is not likely to be achieved in a bona fide on-call operation without any predetermined plan."

• • • • • • •

*"Schedules or their equivalent.*—The strict observance of a fixed published schedule of departures and arrivals, regardless of the available traffic, though the accepted practice of regular-route common carriers of passengers, is the ultimate in regular-route service by motor carriers of property, which is not achieved by more than a few. On the other hand, practices in the matter of tendering shipments and the preference of consignees for early morning deliveries tends to fix upon carriers, who regularly serve numerous shippers at merchandise distributing centers, a pattern of departures and arrivals which is characteristic of regular-route operators to a far greater degree than in the case of those who operate strictly on-call and over irregular routes. Like the respondent here, such regular-route carriers are engaged during the day in assembling and sorting less-than-truckload shipments preparatory to the loading of line-haul equipment. Normally all pick-ups are completed by late afternoon or early evening. As soon thereafter as practicable, line-haul equipment is loaded and dispatched, with a view to deliveries the next morning as soon as possible after the opening of business. Occasionally the early receipt of shipments for certain points aggregating more than a truckload permits the dispatching of a line-haul truck earlier than the usual hour. On other occasions the shipments received on a given day may be so slight that they are held over for the succeeding day to avoid operation of line-haul equipment too lightly loaded. Generally, however, regular-route operations of motor carriers of miscellaneous less-than-truckload freight are marked by a regularity in the arrival and departures of equipment, which is not characteristic of carriers operating only on-call and over irregular routes. Although more flexible, such customary arrival and departure times are the equivalent of the published schedules observed by passenger carriers generally and serve to emphasize the periodicity which identifies a regular-route service."

47 M.C.C. 23, 43-56 (1947).

route operation, was justified by the conceded facts. To hold otherwise would, in effect, amount to an authorization by the holder of an irregular route certificate, authorizing service between St. Paul and Minneapolis on the one hand and all points in Iowa on the other, to establish regular route operation between St. Paul and Minneapolis and each and every point in Iowa without any finding that such service was necessary or convenient to the public or without any finding that such service had ever at any time been given between two specific points. Such type of service is not that authorized by an irregular route certificate.

The contention that the Commission has restricted the service of this irregular route carrier for the purpose of improving the competitive position of regular route common carriers between the points involved is without merit. There is no indication in the order that such was the proximate ground for the Commission's cease and desist order.[5] It is

---

[5] "ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 3rd day of February, A. D. 1947.

No. MC-C-246

Transportation Activities of Brady Transfer and Storage Company

*It appearing*, That by an order dated February 4, 1941, the Commission, division 5, on its own motion, entered upon an investigation into and concerning the lawfulness of certain motor common carrier operations of Brady Transfer and Storage Company of Fort Dodge, Iowa;

*And it further appearing*, That a full investigation of the matters and things involved in such proceeding has been made, and that the said division, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

*It is ordered*, That the respondent be, and it is hereby, notified and required to cease and desist, on or before April 9, 1947, from the motor carrier operations which it is found in said report now to be conducting without appropriate authority from this Commission, and to abstain from a resumption of such operations, until appropriate authority therefor has been obtained from this Commission, and that this proceeding be discontinued.

By the Commission, division 5.

W. P. Bartel,
*Secretary.*

(Seal)"

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clear that this order was made because of a finding, which we have heretofore concluded to be justified, that Brady was exceeding the authority of its irregular route certificate. If the result of the order may incidentally be to the advantage of other carriers operating between these points, then it is a result contemplated by the law and therefore not based upon any sinister or improper ground.

Is the order invalid for uncertainty? Brady contends that it is because it simply orders it to cease and desist from exceeding its authority without informing it with definiteness and certainty just what it can do under its irregular route certificate without becoming a regular route carrier and thereby exceeding the authority it holds. As heretofore noted, the Commission has gone to considerable lengths in advising Brady and other carriers of what factors may be relevant to a determination by the carrier of its rights under an irregular route certificate. It cannot, as heretofore observed, lay down any hard and fast inelastic rule by which every case can be automatically determined. The order is sufficiently definite and certain that it is not invalid for want thereof.

There remains the contention that the order is discriminatory because it imposes the classification of an irregular route carrier upon Brady with accompanying restrictions without any reasonable relation to the purpose of the Act. This contention has been answered by what has been said heretofore.

It may with propriety, however, be added that the Act of Congress contemplated that its administration should be primarily in the interest of the public convenience and necessity. Such being at least one of the purposes of the Act, it cannot reasonably be held that the limitation which the Commission stated in the irregular route certificate, to the effect that the holder thereof should not operate as a regular route operator, was not in the interest of public convenience and necessity. One of the underlying principles of regulation of utilities generally is that when the sovereignty assumes the power of regulation and requires the service and type of service which the regulatory authorities determine to be necessary and convenient in the public in-

terest then some measure of protection against indiscriminate and uncontrolled competition must be provided.

The injunction will be denied and the complaint dismissed on the merits.

(S.) JOSEPH W. WOODROUGH,
*United States Circuit Judge.*
(S.) J. C. COLLET,
*United States Circuit Judge.*
(S.) CHAS. A. DEWEY,
*United States District Judge.*

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## APPENDIX "B"

Finding of Fact and Conclusions of Law Filed in U. S. District Court, September 3, 1948

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION.

No. 834—Civil

Filed September 3, 1948. N. F. Reed, Clerk, by (S.) Gertrude Darrell, Deputy

BRADY TRANSFER & STORAGE COMPANY, *Plaintiff*,

*vs.*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

*and*

IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Plaintiff*,

*and*

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Defendant*

### Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1

*Jurisdictional Facts*

This action is brought by Brady Transfer and Storage Company to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission directing it to cease and desist from exceeding the limits of its authorization in one of its irregular route certificates. The plaintiff's principal office and place of business is at Fort

Dodge, Iowa, and it is engaged in the transportation of interstate commerce between points in various states, including points in the Southern District of Iowa as a common carrier by motor vehicle subject to Part II of the Interstate Commerce Act under various certificates of convenience and necessity issued by the Commission among which is a certificate authorizing it to perform services as an irregular route common carrier by motor vehicle between St. Paul and Minneapolis, Minnesota, and all points in Iowa, including Spencer and Fort Dodge.[6]

Jurisdiction of this, a statutory three-judge Court, is conferred by the Urgent Deficiencies Act of October 22, 1913, 38 Statutes at Large 219; 28 U. S. C. A. 41 (28).

2

The Interstate Commerce Commission, after an investigation and hearing, found that the plaintiff was exceeding the authority of its irregular route certificate in so far as its operations thereunder between St. Paul and Minneapolis on the one hand and Spencer and Fort Dodge on the other were concerned, and ordered plaintiff to cease and desist from continuing to exceed that authority.

3

The Commission's order was based upon the factual premise that the plaintiff, Brady, had prior to June 1, 1935, performed occasional operations from St. Paul and Minneapolis to indiscriminate points in the area comprising the State of Iowa. The application to the Commission for authority to continue that type of operation under the so-called Grandfather Clause of the Motor Carrier Act of 1935 was predicated upon the same factual basis. The irregular route certificate issued to and held by plaintiff does not

---

[6] The route in question is described in the certificate No. MC 52110, Sheet No. 4 as follows:

"IRREGULAR ROUTES:

General commodities as specified above,

Between the following points and places: all points and places in Iowa, * * * Minneapolis * * * St. Paul, Minn., * * *"

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limit the quantity or volume of business conducted under authority of that certificate nor the frequency of operations between points or areas specified in that certificate. It does limit the *type* of operation under that certificate to the *type* of operation classified by the Commission as that of an irregular route operator.

4

The plaintiff continued its operation under authority of the Act pending the determination of its application for the irregular route certificate. Its operation as originally conducted and as it was conducted at the time of the application for the irregular route certificate was coincidental with the requests of individual shippers and not on a periodical, scheduled, predetermined plant of operation.

5

Thereafter the plaintiff changed the foregoing type of its operation to that of a scheduled, periodical, planned, advertised, solicited service between St. Paul and Minneapolis and Spencer and Fort Dodge, giving daily service over the same route.

6

The facts found by the Commission in its report are, for the purposes of this case, conceded. Those facts as incorporated in the Commission's order are by reference incorporated herein as the Court's formal findings of fact.

CONCLUSIONS OF LAW

1

The Court has jurisdiction of the parties and of the subject matter.

2

The order of the Commission is not patently oppressive or unreasonable and is supported by the requisite facts.

3

The Commission has authority to classify common carriers of property by motor vehicle into regular and irreg-

ular route carriers. 49 U. S. C. A. 303(a) (14), 304(b), 306(a) (1947 Cumulative Annual Pocket Part).

4

The classification of said common carriers into regular and irregular route carriers was made by the Commission. Classification of Motor Carriers of Property, 2 M.C.C. 703 (1937).

5

Said classification is not unreasonable nor patently oppressive and has factual support in the conditions in the industry and the evidence in the record before the Commission.

6

As admitted by the plaintiff, the Commission's finding that it had changed its service between St. Paul and Minneapolis, Minnesota, on the one hand and Spencer and Fort Dodge, Iowa, on the other into regular route service is supported by substantial evidence.

7

The order of the Commission is not invalid for want of certainty.

8

The affidavit offered by the plaintiff in evidence at the time of the hearing of this cause and which was received subject to objection has been received in evidence and considered in so far as such affidavit is material and relevant to the issues in this case.

9

The complaint should be dismissed on the merits.

(S.) JOSEPH W. WOODROUGH,
*United States Circuit Judge.*
(S.) J. C. COLLET,
*United States Circuit Judge.*
(S.) CHAS. A. DEWEY,
*United States District Judge.*



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NOV 17 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948

## No. 397

BRADY TRANSFER & STORAGE COMPANY, *et al.*,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA, *et al.*,
*Appellees,*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

## BRIEF OF BRADY TRANSFER & STORAGE COMPANY, APPELLANT, IN OPPOSITION TO THE MOTION TO AFFIRM.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

## BRIEF OF BRADY TRANSFER & STORAGE COMPANY, APPELLANT, IN OPPOSITION TO THE MOTION TO AFFIRM.

### Questions presented.

Appellant, Brady Transfer and Storage Company, hereinafter referred to as Brady, respectfully urges this honorable Court to deny appellees' Motion to Affirm, filed in the Court below. Brady emphatically denies the representations made by appellees in support of their motion, and earnestly beseeches this Court to hear this appeal.

Appellees do not contend that this Court lacks jurisdiction, nor do they suggest that the appeal was taken for

delay only. They recognize that the case before the Commission was looked upon as a test case as to the legal questions involved, and that the decision is of importance, not only to Brady, but also to holders of irregular-route certificates generally. Yet the appellees move the Court to dispose of the case summarily. This procedure, however, is and should be followed only when necessary to cut off frivolous appeals, which is not the case here.

Brady's jurisdictional statement shows that this appeal presents five substantial questions of law which involve the construction and constitutionality of particular sections of the Motor Carrier Act, 1935 (49 U.S.C. §301, et seq.), and the extent of the authority conferred on the Interstate Commerce Commission thereby. These questions may be paraphrased as follows:

1. Does the Motor Carrier Act, 1935, either limit by its own terms, or grant the Commission the power to limit the methods, regularity, frequency or quantity of service which may be rendered by a common carrier of property to whom has been granted a certificate of public convenience and necessity to transport general commodities in both truckload and less-truckload lots over *irregular routes*—that is, routes of the carrier's own selection between authorized points?

2. Does the policy of the Motor Carrier Act, 1935, require the Commission to restrict, by classification or otherwise, the methods, regularity, frequency and quantity of service which may be rendered by such a common carrier of property for the purpose of protecting regular-route carriers (those whose highways are specified) from increased competition by the irregular-route carrier, both carriers being authorized to serve the same points?

3. Does not the proviso in Section 208(a) of the Act (49

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U.S.C. §308[a])[1] specifically prohibit the Commission from imposing restrictions on the method, regularity, frequency and quantity of Brady's operations such as is contemplated by the Commission's order in the instant case?

4. Assuming the Commission has the power sought to be exercised by its order, is not that order so uncertain as to violate due process?

5. Assuming that the Motor Carrier Act, 1935, purports to confer the power sought to be exercised, would not that make the Act unconstitutional in this respect because of a discriminatory classification?

Appellees' Motion to Affirm deals only with the first question. The remaining questions are ignored. As to the first question, appellees' principal contention is that it was set at rest (adversely to the Brady viewpoint in this appeal) by the affirmance on motion of the decision of the lower court in *Falwell* v. *United States*, 330 U.S. 807. A secondary contention of the appellees is that in *United States* v. *Maher*, 307 U.S. 148, this Court sustained a denial by the Commission to a common carrier of passengers of a certificate under the grandfather clause upon a construction of the Act which appellees claim is equally applicable to common carriers of property; thereby appellees urge that the first question should be answered in the affirmative, that is, against Brady. On these grounds, appellees assert that

---

[1] Section 208(a) provides that certificates issued to common carriers by motor vehicle shall specify the service to be rendered, the routes, the fixed termini, the territory, etc. It grants the Commission power to impose reasonable terms, conditions and limitations in connection with certificates, subject to a proviso which reads as follows:

> *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

this appeal presents no substantial questions, and move for summary affirmance of the decree of the lower court.

Under points I and II below, we show that the grounds for appellees' motion are without validity. Under point III we show that the construction accorded the Act by the Commission and the lower court is directly opposed, in principle, to the construction which this Court gave the Act in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, and *Howard Hall Co.* v. *United States*, 315 U.S. 495. Under point IV, we show that all five questions presented for decision by this appeal are substantial questions which merit full and careful consideration by this Court after affording the parties the opportunity to file briefs and to present oral argument.

**I. Brady sincerely believes that none of the questions presented for decision by this appeal were passed upon by this Court in its affirmance on motion in the Falwell case.**

In the *Falwell* case, this Court, on motion, sustained a decree of the lower court which dismissed a bill seeking to enjoin an order of the Commission which denied an application under Section 5 of the Interstate Commerce Act (49 U.S.C. §5) for approval of a proposed purchase by one motor carrier of the properties of another motor carrier. In granting that motion, this Court simply said:

> The motion to affirm is granted and the judgment is affirmed. Secs. 5 and 17, Interstate Commerce Act, 54 Stat. 905, 913, c. 722, 49 U.S.C. Secs. 5 and 17.

Brady is not, of course, in a position to state the views which this Court held as to the proper construction of the Act or any section thereof when it granted the motion mentioned. To attempt such a statement would be presump-

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tuous. However, Brady sincerely believes that this Court did not intend to pass on any of the questions presented in this appeal. The basis for that belief is found in the history of the *Falwell* case and the particular questions involved therein.

In *Falwell Fast Frt., Inc.-Purchase-Draper and Evans Line, Inc.* (1946), 40 M.C.C. 439, the applicant was denied approval under Section 5 of the Interstate Commerce Act of a proposed purchase of an irregular route certificate between the fixed termini of Roanoke and Lynchburg, Va. The applicant owned certificates authorizing operations over regular routes which were in two unconnected parts, the hiatus being between the points mentioned. It proposed to unify the purchased rights with its rights over specified highways and to operate a regular through service.

The commission denied that application upon the finding that it "had not been shown to be consistent with the public interest (pp. 443, 444). For one ground, the Commission held that the irregular-route right sought to be transferred constituted one segment of a larger grant which should continue to be operated as a whole since otherwise there would be a "split" of a single right (p. 442). For another ground, the Commission held that the proposed through operations would be unauthorized under the theory of the law on which the Commission acted in the instant case (p. 443), that is, that they would constitute an unlawful conversion into so-called "regular-route" *services* which the Commission viewed as beyond the authority granted by a certificate which specifies irregular routes.

In *Falwell* v. *United States*, 69 F. Supp. 71, a statutory court sustained the order of the Commission and accepted as proper the construction which the Commission placed on the Act. On appeal to this Court, appellees filed a Motion to Affirm. Undersigned counsel appeared and filed their

brief as *amici curiae* to oppose that motion. In that brief, we urged that the second ground on which the Commission rested its order involved an erroneous construction of the statute and that the lower court was in error in sustaining the Commission on that point. However, we offered no opposition to that Motion to Affirm if this Court viewed the order of the Commission as sustainable on grounds severable from the question of permissible service over irregular routes; that is, if sustainable as within the field of permissible administrative discretion under Section 5, without regard to the Sections of the Motor Carrier Act, 1935, involved in the instant case. As to what are the limits of that field, we took no position in that brief.

Counsel for the Regular Route Common Carriers Conference of the American Trucking Association, Inc., intervening defendant in the lower court in the instant case, also filed a brief as *amici curiae* in the *Falwell* case. They supported the Motion to Affirm and went even further in minimizing the relevancy of the regular-route conversion theory. They urged this Court to affirm on the sole ground that the Commission's action was within the permissible limits of administrative discretion under Section 5[2].

---

[2] On pages 11 and 12 of their brief, they said:

> We have been advised, informally, that the Irregular Route Common Carrier Conference expects to argue that there is presented here the broad general issues involving the distinctions between the service which regular-route carriers and irregular-route carriers may render under certificates issued under Section 208. Assuming that our advice is correct, *it is our position that the Commission's power and discretion under Section 5 are entirely distinct from the question of permissible service under Section 208.* Here the Commission had ample grounds to deny Falwell's application under Section 5 and we submit that the *Falwell* case should be decided in the light of the Commission's discretion with respect to mergers under Section 5. Presumably the Irregular Route Common Carrier Conference may refer to a so-called *Brady* case, which is pending before the Commission and for that reason we wish

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The circumstances just described, and the phraseology used by this Court in granting the Motion to Affirm in the *Falwell* case, leads Brady to believe that this Court affirmed the decrees of the lower court for reasons different from those stated in the opinion of that Court, those reasons being quoted in footnote 4 in appellees' Motion to Affirm in this case.

But in addition, we respectfully submit that even if this Court viewed the reasoning of the lower Court in the *Falwell* case as apparently sound, it should nevertheless accord Brady an opportunity to be heard on brief and at oral argument in the instant case. This case involves exceedingly important and substantial questions of statutory construction and constitutional questions which were not discussed by the lower court in the *Falwell* case. That is true as to questions Nos. 2, 3, 4 and 5 as above stated. Further, the lower court in the *Falwell* case apparently gave no consideration to the legislative history in reaching its conclusions as to the proper construction of the Act. That legislative history throws an entirely different light on the questions involved and merits the careful consideration of this Court before a decision is reached in the instant case.

Finally, this Court was not provided with complete briefs and did not hear oral arguments in the *Falwell* case. The instant case is looked upon by the industry and the Commission as a test case. In such a case, it would best serve the public interest if this Court were well advised by briefs and oral arguments before it arrives at its final decision.

---

to point out that the *Brady* case involves a charge of rendering service in excess of certificated authority, whereas the issues in the *Falwell* case involved consistency with the public interest under Section 5. We believe that there are no good reasons for confusing the issues in the *Falwell* case by reference to such issues as may at a later time arise under the *Brady* case.

**II. The Maher case does not control this case.**

In order to determine the extent to which the instant case is similar, if at all, to the *Maher* case, it is necessary to note how that case arose, what was decided therein, and the grounds for the decision, and to note, in contrast, how this case arose, what was decided therein, and the grounds therefor.

The *Maher* case involved the validity of the Commission's action in *Maher Common Carrier Application*, 3 M.C.C. 479, in denying a certificate to a carrier of passengers which claimed grandfather rights. The controlling circumstances were as follows: On May 29, 1936, which was after the critical date for determining grandfather rights, Maher instituted a regular bus operation on schedule between terminals at Portland, Ore., and Seattle, Wash. The operations which he had conducted prior thereto were described by the Commission as follows (3 M.C.C. 479, 480):

> Applicant has been engaged in the transportation of passengers since 1931. Prior to the institution of his present regular operation between Portland and Seattle on May 29, 1936, he conducted an irregular, so-called anywhere-for-hire operation in Oregon, with occasional trips to points in Washington. This operation consisted mostly of the transportation of groups of employees from Portland to logging camps in Oregon and Washington. Baseball and basketball teams were also transported. Applicant maintained no terminal facilities. He obtained his business principally through contacts with employment agencies at Portland where men were hired for work at logging camps.

This Court noted (p. 151) that the evidence before the Commission showed "rare trips to Seattle, no service at all to most of the intervening points, and no showing that passengers were transported on return trips to Portland."

The Commission denied the Maher application upon a

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finding that he had failed to show that the services for which a certificate was sought had been conducted by the applicant on the critical date, June 1, 1935.

Speaking to the situation before it, this Court approved the action of the Commission in differentiating between "'anywhere-for-hire' bus operations over irregular routes and regular-route bus operation between fixed termini." It held that the Commission rightfully rejected the application because "the new regular route of appellee was not in existence on June 1, 1935, and the irregular 'anywhere-for-hire' service was not 'so operated' as required by Sec. 206, when the Commission passed upon the application for a 'grandfather' certificate."

Both this Court and the Commission took the view that Maher had abandoned the operations in the carriage of passengers conducted on June 1, 1935, and prior thereto, and in lieu thereof, had substituted distinctly new and different operations.

The complaint in this case filed in the lower court and the reports of the Commission attached as appendices thereto, show that the questions here involved arise under the following circumstances. Within the time required by the Act, Brady applied to the Commission for a certificate of public convenience and necessity as a common carrier of property by motor vehicle based on operations alleged to have been conducted in the "grandfather" period. That application sought certain regular-route authority in interstate commerce in Iowa and very extensive irregular-route authority between points in Iowa and points in other states, including twenty-one points in Minnesota[3]. Pending action

[3] The appendices to the report of the Commission in *Brady Transfer & Storage Company Common Carrier Application*, 23 M.C.C. 767, 783, describe the points and territories covered by Brady's application under the grandfather clause of Section 206(a) of the Motor Carrier Act, 1935.

on the application, Brady was permitted, under the statute, to continue all of the operations for which a certificate was sought. After hearings and three reports, the last one dated September 7, 1944[4] the Commission issued a certificate to Brady under the grandfather clause which covered, among others, operations in the transportation of general commodities over irregular routes between four points in Minnesota (including Minneapolis and St. Paul), on the one hand, and on the other, all points in Iowa.

In 1940, Brady undertook, through solicitation, improved service, and added facilities, to increase the traffic handled to and from the Twin Cities. In the interest of an economical and efficient operation, it set up a terminal at the Twin Cities and the business transported thereto and from was funneled through subterminals at Ft. Dodge and Spencer, Iowa. Thereupon, at the instigation of certain competitors holding certificates over regular routes between the points just mentioned, that is, via specified highways, the Commission instituted the investigation in which it finally issued the order involved in the instant case (*Transportation Activities, Brady Transfer & Storage Co.* [Feb. 7, 1947] 47 I.C.C. 26).

In its report made a part of that order, the Commission found that Brady had no right under its irregular-route certificate to conduct operations between the Twin Cities and Ft. Dodge and Spencer, such as those conducted after 1940. The Commission listed eight characteristics of the service which it held were collectively unauthorized. To these eight characteristics, the Commission applied the following terms: 1) predetermined plan; 2) character of traffic, that is, predominantly in small lots; 3) solicitation; 4) ter-

[4] The third report of the Commission in Brady's certificate case is noted at 43 M.C.C. 834, but is not reported in full. That report is attached as Appendix C to Brady's complaint in the District Court.

minals and call stations; 5) fixed routes; 6) fixed termini; 7) periodicity of service; and 8) schedules or their equivalent. The Commission found that while each characteristic considered individually did not mark an unauthorized service, yet, when all eight characteristics existed in Brady's operations, they reflected a "type of service" not authorized by his certificate which does not specify the precise highways to be traversed.

The Commission did not, however, find that Brady had abandoned a service conducted in the grandfather period or that Brady had substituted a distinctly new and different service in lieu thereof. It simply concluded that Brady was performing too much service between the points and over the highways which he was authorized to serve.

The Commission did not, however, specify the precise limits for the service which Brady is permitted to render under its certificate as construed by the Commission. It suggested that Brady would be on the safe side if he discontinued all eight of the practices mentioned by the Commission. However, the Commission also said (47 I.C.C. 56, italics ours):

> . . . If respondent feels that the terms of compliance outlined above are too onerous; and if it feels that it can make changes in its present operation which will bring them within its present authority and at the same time retain, or continue, any of the practices which originated with, and marked the unlawful conversion of, its original irregular-route service into a regular-route service, it is free, *at its peril*, to take such lesser action than that outlined above as it feels it can justify.

The sub-headings below indicate the principal reasons why the *Maher* case is not controlling on the instant case.

**A. The cases differ fundamentally in respect to the powers sought to be exercised by the Commission.**

In the *Maher* case, the Commission exercised the powers conferred in connection with the grant of a certificate. The Commission was there required to reject the application because it found that the applicant had abandoned one service and had instituted a distinctly new and different service, and that that circumstance took the applicant out from under the protection of the grandfather clause. In that case, it was correct to characterize the prior service as "anywhere-for-hire" because until a certificate is issued the law imposed no geographical limits on where a carrier may go under his general holding-out.

In the instant case, the certificate has been issued. The holding out is now co-terminus with the geographical specifications therein. The term "anywhere-for-hire" is either meaningless or contradictory when applied to the holding out under a certificate, even when no highways are specified (irregular routes), because the certificate definitely specifies geographical limits in terms of points and territories.[5] There is no claim that Brady abandoned an authorized service which has been certificated to him on the basis of operations prior to the critical date. Rather, the Commis-

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[5] The Commission failed to appreciate this obvious distinction between pre-regulation and post-regulation operations because in finding that the matter of a predetermined plan is a criterion of regular-route but not of irregular-route operation, it said (47 M.C.C. 23, 43; italics ours):

> . . . The significant thing is that from day to day and week to week the pattern of a regular-route operation is fixed to a degree inconsistent with a bona fide on-call *anywhere-for-hire service.*

sion and the lower court,[6] viewed the present operations as simply embracing methods, quantity, frequency and regularity of service *in excess* of that which is permissible between authorized points. The order seeks to restrain the performance of that excess. The power sought to be exercised in such a case is obviously different than the power exercised in the *Maher* case. That circumstance alone distinguishes the latter case.

Additionally, the *Maher* case did not touch, even indirectly, the question of the proper construction of the classification section of the Act (Sec. 204[b]; 49 U.S.C. § 304[b]) or the proviso which prohibits the imposition by the Commission of limitations on the quantity of service which may be rendered under a certificate (Sec. 208[a]). Nor did it touch the question of policy declared in the instant case to favor regular-route carriers. Furthermore, the *Maher* case involved no questions of due process like those involved in the instant case.

**B. In the Maher case, the distinction between types of carriers in the passenger field rested on differences in the public undertakings of the carriers embraced in the two types. No such differences mark the alleged types of carriers in the property field.**

When Maher instituted the "new" service which controlled the decision in the *Maher* case, he made a complete change in his public undertaking, that is, in the services held out. That necessarily made a change in his rights

[6] At the time appellants filed their Jurisdictional Statement in the lower court, they had been served with that Court's Findings of Fact and Conclusions of Law, but had not been advised that that Court had written an opinion. This explains the erroneous statement in the Jurisdictional Statement that the District Court wrote no opinion.

and obligations as a common carrier at common law. He had been engaged in charter or special operations of passenger groups. The scope of those operations were a matter of special agreement in respect to each trip and the agreements were made before any trip was undertaken. His new operations consisted of ordinary, over-the-road, terminal-to-terminal, bus operations over a specified highway. He no longer transported passengers from door-to-door. He transported only from terminal to terminal, or he picked up and discharged at intermediate crossroads. He handled individual passengers without any prior arrangements as to where they would be picked up or where they would be delivered. From the standpoint of the passenger, he performed an entirely different function.

His use of irregular, that is, unrestricted highways in the one case, and of regular routes, that is, specified or restricted highways in the other case, was purely incidental to the type of service which he performed. That difference as to highways was not the dominant characteristic of the types of passenger service involved. That is recognized in the documents cited by this Court in footnote 3 to its decision in the *Maher* case, which deal with legislative history.

In the instant case, the elements which define the public undertaking or the holding-out of a carrier of property are precisely the same whether the carrier uses irregular routes, that is, highways of his own choice from origin to destination, as whether the carrier uses regular routes, that is, service restricted to particular highways. There is a like similarity in respect to the common law rights, duties, and obligations of these carriers, whether the routes are fixed or not. *State* v. *Rosenstein* (1934) 217 Iowa 985, 990-991, 252 N.W. 251, 254; *Campbell* v. *A.B.C. Storage & Van Co.* (1915), 187 Mo. App. 565, 174 S.W. 140,

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142; *Stevenson & Co.* v. *Hartman* (1921), 231 N.Y. 378, 380-381, 132 N.E. 121, 122, 18 A.L.R. 1314, 1315; and *Walton* v. *A.B.C. Fireproof Warehouse Co.* (1941), 235 Mo. App. 939, 151 S.W. 2nd 494, 498, 499.

From the standpoint of a shipper of property, the function performed by a carrier over regular routes is identical with the function performed by a carrier over irregular routes. In both cases, the goods are simply taken from a store-door at origin and moved by whatever method the carrier deems most economical and efficient to a store-door at destination. Whether or not there are differences in periodicity, regularity, expedition and internal operating methods, nevertheless the holding-out, the public undertaking, and the function performed are the same in both cases.

The distinction between types of carriers in the passenger field rest on fundamental differences which have no counterpart in the field of common carriage of property. Under such circumstances, the principles declared in the *Maher* case have no pertinency to the first question presented.

**C. There is a significant difference between the specific provisions of the statute which relate to common carriers of passengers over irregular routes and those which relate to common carriers of property over irregular routes.**

The definition section (203(a)(14)) and the grandfather clause (206(a)) in the Motor Carrier Act, 1935, embrace both property carriers and passenger carriers over both regular and irregular routes. In this sense, it is correct to say that the Act "recognizes" a type of carrier over regular routes and a type of carrier over irregular routes. However, that recognition does not go beyond the point that in the one case it is recognized that the carrier may

chose the highways to be traversed between authorized points, while in the other case, the carrier is restricted to a particular highway. No question in this case is answered by simply noting that recognition in the statute. The real question is whether a carrier over irregular routes is limited, merely by reason of that irregularity in routes, to an irregular or limited service.

On this point, the Motor Carrier Act, 1935, contains a pertinent provision which directly couples irregularity in routes with a limited service in the case of passenger carriers, no similar provision being provided for property carriers. That special provision for passenger carriers is contained in Sec. 207(a) which provides generally for the issuance of certificates to both property and passenger carriers, subject to a proviso limited to the latter which reads as follows:

> That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

This means that common carriers of passengers authorized to operate over irregular routes are restricted to those engaged in special or charter operations. The two go hand in hand. Passenger carriers in the irregular route class are necessarily in a restricted service class under this provision of the statute.

The Act contains no similar provision with respect to common carriers of property. This difference in statutory provisions was proposed by Mr. J. B. Eastman when he was Federal Coordinator of Transportation and at the time he recommended to Congress the bill which finally became the Motor Carrier Act, 1935. Mr. Eastman ex-

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plained this difference in statutory provisions as follows (italics ours):

> In section 307 a proviso has been added to prohibit the issuance of a certificate to common carriers of passengers for operations over other than regular routes and between fixed termini, except in the case of special or charter operations. *The bus industry differs from the truck industry in that there is no substantial need for operation over irregular routes.* The prohibition which has been added is a necessary measure of protection for regular route operators. (House Doc. No. 89, 74th Cong., 1st Sess., p. 62.)

This difference in statutory provisions makes inapplicable to the instant case the distinction between types of passenger carriers involved in the *Maher* case.

**D. The Commission holds that the Maher case is not controlling in the grant of grandfather certificates to common carriers of property under like circumstances.**

The Commission itself has recognized that the *Maher* case is not controlling when the question is as to whether a certificate of public convenience and necessity should be issued to a common carrier of property under circumstances similar to those involved in the *Maher* case. By similar circumstances we mean the institution after the critical date of a repetitive, regular service between terminals over the same highways, the prior service consisting of an irregular service over a variety of highways throughout a territory which embraces the termini served by the subsequent, regular service.

This is illustrated by *Southern United Lines Inc., Com. car. Applic.* (1943), 42 M.C.C. 251, reversing a prior report (1940), 24 M.C.C. 241. That case is on all fours with the *Maher* case, except for the fact that it involved the grandfather application of a common carrier of property

rather than of passengers. In the grandfather period, the applicant in that case and its predecessor conducted a territorial, anywhere-for-hire operation over irregular routes. After the critical date, the applicant instituted a regular service between Greenville, S.C. and Atlanta, Ga. This change was made in September, 1938, when the applicant instituted "a daily operation between Greenville and Atlanta" (42 M.C.C. 257). After the change, the applicant "maintained terminals at both Atlanta and Greenville, and the regular route service between these points, which has been almost daily, has included service to the intermediate points on the highways used" (24 M.C.C. 245). While the points mentioned were within the applicant's territory, they were served only irregularly in the grandfather period. In the first report, the Commission, on the direct authority of the *Maher* case, denied the application for a grandfather certificate and at page 245 said:

> Such change has been from an irregular-route, territorial service to that performed by an ordinary common carrier over a regular route or routes and between fixed termini.

In the second report upon reconsideration, the Commission reversed the prior decision and held that applicant was entitled to a grandfather certificate over irregular routes between the fixed termini, Atlanta and Greenville. It reasoned that those points were served with sufficient substantiality to show a bona fide operation in the grandfather period and that under the statute the applicant had a right to a grandfather certificate covering the fixed termini between which service had been continued, even though the remainder of the territory had been abandoned and the service between the fixed termini had evolved into a daily operation over the same highways. However, the certificate granted authorized "irregular routes' be-

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cause the applicant had not confined his service to particular highways in the grandfather period.

The Commission case just cited well evidences the inapplicability of the *Maher* case to the questions involved in this case.

**III. To apply the theory of the Maher case to the instant case would do violence to the construction given the statute by this Court in cases involving the grant of certificates to common carriers of property over irregular routes.**

As stated, the distinction between common carriers of property over irregular routes and common carriers of property over regular routes approved by the lower court relates not merely to the matter of highways used but rather involves the method, quantity, frequency and regularity of service over highways and between points which no one denies is authorized—*provided* the service is performed by different methods and with less regularity. That view attaches a significance to the matter of irregularity in the use of highways which is at variance with the holdings of this Court in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480, and *Howard Hall Co.* v. *United States*, 315 U.S. 495, 498.

In the *Carolina Freight Carriers Corp.* case, this Court set aside an order of the Commission which limited the commodities authorized in the case of a common carrier of property over irregular routes. One question was involved as to the extent to which the Commission is authorized to treat irregular-route common carriers of property differently from regular-route common carriers of property. This Court said at page 485:

> The difference between those types of carriers may well justify a sharp delimitation of the far flung ter-

> ritory which an irregular route carrier may profess to serve. But once the territory has been defined, the statutory test of whether an applicant was a "common carrier" by motor vehicle in "bona fide operation" during the critical periods is the same for the irregular and the regular route carrier.

The *Howard Hall Co.* case is to the same effect. The construction given the statute by this Court in the cases cited is contrary to the construction for which the appellees contend on the authority of the *Maher* case.

Appellees' argument that the decree below should be affirmed because, if that is not done, the appellants will "eat their cake and have it too" is also at variance with the views stated by this Court in the two cases just cited. The quoted phrase expresses appellees' view that the Commission has granted to carriers over irregular routes broader territorial rights than would have been granted if the operations in the grandfather period had been confined to specified highways. From that premise, appellees argue that an unlimited right to expand the facilities, regularity and quantity of service would give irregular-route carriers an unwarranted advantage over, and greater privileges than are provided for, regular-route carriers. *Alton R. Co. v. United States,* 315 U.S. 15, is cited to support this view.

The certificate involved in that case granted authority to transport automobiles, the carrier being a specialty carrier. It is true that such carriers were given broad territory based on the mere holding out of service, as distinguished from actual or substantial service. However, that was not true of certificates granted to common carriers of general commodities like Brady. The *Alton* case is not in point.

As heretofore stated, Brady's original application sought authority to serve the twenty one points in Minnesota, based on proof of general holding-out and some

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service thereto and from. The certificate finally issued to Brady, which was limited to points to and from which a substantial service was shown, covered only four points in Minnesota, two of them being Minneapolis and St. Paul. The Commission cut down the grant to Brady in recognition of the irregular-route operations which he conducted in this area. In so doing, the Commission conformed to the views of this Court as stated in the *Carolina Freight Carriers* case *supra* and in the *Howard Hall* case *supra*. The *Howard Hall* case is an especially apt example of such cutting down of territory since there a carrier of general commodities sought authority to serve all points within 100 miles from Birmingham over irregular-routes and the Commission cut the radius of the authorized territory down to 10 miles. This Court held that in view of the territorial type, that is, the irregular-route operations conducted by that applicant, the Commission was on sound ground in that action.

## IV. The questions presented are novel, substantial and important.

In view of the invalidity of the reasons and authorities cited by the appellees in support of their contention that the first question is insubstantial, it is perhaps unnecessary to deal with the questions which the appellees ignore in their motion. However, so that the Court may be fully advised as to the novelty, importance and substantiality of all of the questions presented by this appeal, each of them is briefly noted below.

**Question No. 1: The alleged power of the Commission to treat the irregular-route type of common carrier of property as a carrier of a restricted service type.**

This Court has not heretofor been called upon to decide this question in a case which involves the permissible limits

of service which may be rendered by common carrier of property who holds a certificate of public convenience and necessity authorizing service over irregular routes.

In *Application of Kassebaum* (1943), 142 Neb. 645, 7 N.W. (2d) 464, the Nebraska Commission had issued a cease and desist order against an irregular route property carrier like the order in this case. The Nebraska statute contained provisions identical with those found in Sections 203(a)(14), 206(a) and 208(a) of the Federal Act. The Supreme Court of Nebraska struck down that order on the ground of lack of power.

Brady is confident that this Court will be persuaded to a like decision if opportunity is provided to brief the case, to develop the legislative history, and to be heard in oral argument.

**Question No. 2: The alleged power of the Commission under Section 204(b) to restrict by classification the service of common carriers of property over irregular routes for the competitive benefit of other common carriers of property which are authorized to serve the same points over regular routes.**

Section 204(b) (49 U.S.C. §304[b]) provides that

> * * * the Commission may from time to time establish such just and reasonable classifications * * * of groups of carriers included in the term "common carrier by motor vehicle" * * * as the special nature of the services performed by such carriers * * * shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers * * * so classified or grouped, as the Commission deems necessary or desirable in the public interest.

In *Classification of Motor Carriers of Property*, 2 M.C.C. 703, the Commission issued its classification pursuant to the power conferred in the section just quoted. At page

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709, under the heading "Types of Property Carrier Service—Explanation", the Commission undertook to define regular-route scheduled service, regular-route non-scheduled service, irregular-route radial service and irregular-route non-radial service.[7] That "Explanation" does not

[7] Such explanations read as follows:

(A) *Regular-route scheduled service.*—A regular-route scheduled-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation between fixed termini and over a regular route or routes upon established or fixed schedules.

(B) *Regular-route nonscheduled service.*—A regular-route nonscheduled-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation between fixed termini and over a regular route or routes at intermittent intervals and not upon an established or fixed schedule.

(C) *Irregular-route radial service.*—An irregular-route radial-service carrier is any persons who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes from a fixed base point or points to points or places located within such radial area as shall have been fixed and authorized by the Interstate Commerce Commission in a certificate of public convenience and necessity, or permit, or from any point located within such radial area to such carrier's fixed base point or points.

(D) *Irregular-route nonradial service.*—An irregular route nonradial-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes between points or communities located within such general territory as shall have been defined geographically and authorized in a certificate of public convenience and necessary, or permit, and any other points or communities located within the same general territory without respect to a hub community or a fixed base point of operation.

purport to define types of property carriers over irregular routes in the terms of the criteria or characteristics used by the Commission in the instant case. In fact, insofar as irregular-route service is concerned, no word or phrase is used which relates even indirectly to methods, frequency, periodicity, regularity or quantity of service.[8]

On the face of it, the quoted provision does not purport to confer any power on the Commission to limit permissible service under a certificate. To read such a power into this provision would not be consistent with the "grandfather" clause of Section 206(a) (49 U.S.C. §306[a]).

Nevertheless, the Commission and the lower court rely heavily on the section above quoted and the order entered in the Commission case just mentioned. (See conclusions of law Nos. 3 and 4 of the lower court, pp. 25-26 of Statement as to Jurisdiction). This is also true as to the opinion of the lower court in the *Falwell* case.

The legislative history shows that such a construction of the statute was never intended by Congress. This is borne out by the statements of Mr. Eastman as Federal Coordinator of Transportation in recommending the section, and the statement of Senator Wheeler in reporting the bill to the Senate, both of which are quoted in the margin.[9]

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[8] It is worthy of note that in the classification quoted in footnote 7, the Commission set up two classes of regular-route carriers of property, the only difference being in the matter of established or fixed schedules, a true service characteristic. Despite that classification, the Commission said in its report in the instant case (47 M.C.C. 23, 36):

> . . . any carrier of property authorized to operate over any described regular route lawfully may establish thereover either a scheduled or a nonscheduled service.

[9] In explanation of this section, the Coordinator in his report of January 21, 1935, said (H. Doc. 89, 74th Cong., 1st Sess., p. 60):

> The provision empowering the Commission to classify common or contract carriers, respectively, into distinctive groups

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This Court has not heretofor construed Sec. 204(b) of the Motor Carrier Act, 1935. The construction of that section presents a novel, important and substantial question.

Question No. 2 also involves the lawfulness of the policy of regulation which the Commission asserted and followed in the instant case. At page 23 of its report in 47 M.C.C.,

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according to the special nature of their services, and to provide regulations for such classes or groups which are appropriate to their operations and consistent with the public interest, is of special significance in the case of motor-carrier operations. This provision, coupled with others which give the Commission a broad measure of administrative discretion, has in view the fact that the motor-carrier industry embraces many specialized types of carriers whose operations are not conformable to a single pattern of regulation and the need, in the public interest, of a form and degree of regulation sufficiently flexible to assure the proper development of motor transportation. This provision for classification or grouping of motor carriers has a particularly important relation to the regulation of contract carriers.

In reporting to the Senate, Senator Wheeler said (79th Cong. Rec., p. 5879):

> This paragraph is of great importance. It enables the Commission to classify carriers performing special and distinct types of service, such as hauling of milk, livestock, furniture, petroleum products, newspapers, and so forth, and to vary the regulatory requirements as to rates, records, reports, and other matters in accordance with the nature of the service and the public need. These provisions will promote flexible administration and enable the Commission to avoid imposing unnecessary burdens. It is to the interest of carriers, shippers, and the public that this paragraph be retained.
>
> I think that this is an exceedingly important paragraph, because of the fact that the Commission may find, for instance, that persons who are engaged simply in hauling furniture need one kind of regulations or rules that may be prescribed. Another classification may be those who are engaged in hauling oil or gasoline, and a certain type of regulations may be necessary for them. This paragraph gives to the Commission the power to handle those matters.

the Commission gave the following as a policy reason for seeking to restrict the method, frequency and quantity of the service rendered by Brady over irregular routes:

> • • • It is imperative that they be so limited if, consistently with the national transportation policy, regular-route operators, between points between which ample regular-route service is already being furnished, are to be protected from destructive competition. As seen, these carriers cannot move to other territory and without the protection from uncontrolled competition, which the act contemplates, their services might be adversely affected, possibly even to the point of destroying them, to the public detriment. Possession by irregular-route carriers of any such right, indiscriminately and at will to invade the fields of service of regular-route carriers, would largely nullify section 207 of the act, and our ability to carry out our duties of regulation in the public interest would be seriously impaired.

In *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 485-6, this Court struck down an order of the Commission which was based, at least in part, on a policy of regulation identical with that declared in the above quotation from the Commission's report in the instant case.

**Question No. 3: Does not the proviso in Section 208 (a) of the Motor Carrier Act, 1935, specifically withhold from the Commission the power sought to be exercised by its report and order in the instant case.**

In *Nudelman Common Carrier Application,* 28 M.C.C. 91, 93, and *Pittsburgh-Weirton Bus Co., Inc., Common Carrier Application,* 10 M.C.C. 266, 270, the Commission recognized that the proviso in question withheld from it the power to attach limitations to the permissible *quantity* of service which might be rendered by a common carrier between authorized points under a certificate. Yet, the

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order against Brady is predicated on tests and limitations which have only one purpose, to restrict characteristics which relate directly to the amount of service rendered. To claim that such tests and limitations are merely characteristics of a "type of service" does not obscure the fact that they are quantitative restrictions and as such beyond the power of the Commission to impose.

The legislative history of the proviso in Sec. 208(a) is particularly significant in the instant case. In the draft of the bill which the Federal Coordinator of Transportation recommended to Congress, the Commission was authorized to impose terms and conditions as to "the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory." That bill was amended by striking out the quoted words and substituting in lieu thereof, the proviso presently found in Section 208(a). In reporting this change in the bill to the Senate, Senator Wheeler said (79th Cong. Rec., p. 5881; italics supplied):

> Section 208(a), page 26, as amended, permits the Commission to attach to all certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions, and limitations. In order to meet criticisms that the effect of these provisions would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended section 208(a) by striking out lines 14 to 16, page 26—("the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory")—and by adding a proviso which permits operators to add to their equipment and facilities as business conditions may require, *provided they do not go beyond the route or routes or outside the territory specified in their certificate.* There was objection to the provision as it came in by a great many, so the committee amended it to meet the objection.

The proviso in Sec. 208(a) was not involved in the *Maher* case, it was not noted by the lower Court in the *Falwell* case, and it is brushed aside in the opinion of lower court in the instant case with a mere statement of disagreement (p. 17 of Statement as to Jurisdiction).

The construction of the proviso in Sec. 208(a) presents a novel, important and substantial question on which the parties should be heard by this Court.

**Question No. 4: Is the order of the Commission sufficiently certain to comply with due process.**

The formal portion of the order entered by the Commission[9] makes the report a part of the order and requires Brady to cease and desist "from the motor carrier operations which it is found in said report now to be conducting without appropriate authority from this Commission, and to abstain from a resumption of such operations, * * *". If Brady fails to take whatever action is necessary to comply with that order, he becomes subject to the special penalty provided by Section 322 of the Motor Carrier Act, 1935, (49 U.S.C. § 322). Consequently, this important question is presented: Assuming the statute grants the Commission the power sought to be exercised in this order, is that order sufficiently certain to constitute due process?

That order has the force of a statute to establish the illegality of the Act which is prohibited thereby. *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 386. Its validity must therefor be tested by the same criteria as would be applied to a statute.

In its report, the Commission told Brady he could comply by the following alternative methods; he could either abandon all of the eight practices found to consti-

[9] Quoted in the margin on p. 20 of the Statement as to Jurisdiction.

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tute the criteria of unauthorized irregular route operations or he could "at his peril" make a lesser change in the operations (47 M.C.C. at p. 56). In *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453, this Court said:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

See also *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 393.

This is the first case in which the Commission has issued a cease and desist order of the character involved in the instant case. The constitutionality of that order presents a novel, substantial and important question.

**Question No. 5: Assuming the statute confers the power claimed by the Commission, is the classification imposed as to types of carriers so arbitrary and so without reasonable or just relation to the intended result of the legislation as to constitute lack of due process.**

If the statute be construed as claimed by the Commission, the lower court and the appellees, it imposes restrictions on the amount of service of irregular-route carriers which are not imposed on regular-route carriers between the same authorized points. If the statute must be so construed, it should be held unconstitutional because such a classification is arbitrary and has no just or reasonable relation to the intended result of the legislature. See *Smith* v. *Cahoon*, 283 U.S. 553, 567; *Southern R. Co.* v. *Greene*, 216 U.S. 400, 417; and *Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 39.

The Commission's theory is that the imposed classification is necessary to prevent unrestrained increase in competition. But an unrestrained increase of service between

authorized points by carriers in either category will produce a like amount of added service and a like amount of added competition for the available traffic. The added competition is no more destructive in the one case than in the other.

There is nothing in the Motor Carrier Act, 1935, which evidences an intent on the part of Congress to make a favored class out of regular-route carriers of property, that class to be specially protected against added competition from carriers of property over irregular routes. It thus appears that the Act, if construed as the Commission claims, is so discriminatory, arbitrary and injurious that it violates the due process clause of the Fifth Amendment. *Detroit Bank* v. *United States*, 317 U.S. 329, 338.

## Conclusion.

The appellant respectfully submits that the questions presented in this case are important and substantial. Much is at stake from the standpoint of the public generally as well as from the standpoint of Brady's private rights. The motion of appellees for summary affirmance should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

No. 397.

BRADY TRANSFER AND STORAGE COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

## BRIEF OF THE IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. IN REPLY TO THE MOTION TO AFFIRM.

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BRADY TRANSFER AND STORAGE COMPANY, ET AL., *Appellants*,

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

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## BRIEF OF THE IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. IN REPLY TO THE MOTION TO AFFIRM.

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### Foreword.

This brief in opposition to Appellees' motion to affirm the judgment and decree entered by the District Court of the United States for the Southern District of Iowa, Central Division, entered September 3, 1948, is presented on behalf of the Irregular Route Common Carrier Conference of the American Trucking Associations, Inc. The Conference was an intervening plaintiff in the proceeding before the District Court.

The Conference is a voluntary association composed of hundreds of common carriers of property by motor vehicle conducting operations over irregular routes by virtue of certificates issued them by the Interstate Commerce Commission. They have a vital interest in the principles of this case as the future growth and development of their businesses may be affected. The Conference members operate substantial transportation businesses and are vitally concerned with the question of whether the Interstate Commerce Commission has power to restrict the quantity and method of performing their transportation services.

## Statement of the Case.

This proceeding results from the report and order of the Interstate Commerce Commission entered February 3, 1947, in Docket No. MC-C-246, entitled, *Transportation Activities of Brady Transfer and Storage Company.* Briefly, the proceeding before the Interstate Commerce Commission presented for determination the question whether Brady Transfer and Storage Company, holding authority to operate over irregular routes, had, by certain actions, converted that irregular route authority to regular route authority in violation of the terms of its certificate of public convenience and necessity.

Departing from the narrow issue presented by the original investigation, the Commission issued a report indicating tentative conclusions on the general question of what constitutes a regular route operation contrasted with an irregular route operation, or the line of demarcation between those two types of operations. This was done, as the Commission states in its report and order of February 3, 1947, "Because of the nationwide importance of this broader question . . .".

In this tentative report the Commission set forth and discussed eight practices thought to be indicative of regular route operations. These eight practices or criteria are re-

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peated and adopted in the February 3, 1947 report of the Commission. Briefly they are:

(1) Operation according to a predetermined plan or outline.

(2) The movement in significant amounts of particular types of traffic.

(3) The vigorous solicitation of this particular type of traffic and the holding out of particular types of service.

(4) The maintenance at significant points of terminals devoted to, and designed for, the expeditious handling of certain traffic and the conduct of certain types of operation.

(5) The habitual use of certain (fixed) routes.

(6) Operation between fixed termini.

(7) A marked or constant periodicity in the service given.

(8) The observance of definite or published schedules or their equivalent.

**Argument.**

The effect of the Commission's report is to hold that these eight criteria are peculiar only to carriers holding certificates authorizing operations over regular routes and, that carriers holding irregular route authority are precluded or forbidden to employ all or some undetermined combination of these eight criteria even though the transportation performed lies wholly within the territorial and commodity authorization.

The statute recognizes only two classes of carriers by motor vehicle—common carriers and contract carriers. The rights, duties, and obligations of common carriers operating over irregular routes are precisely identical with those of carriers operating over regular routes.

The report of the Interstate Commerce Commission would limit the right of carriers operating over irregular

routes to develop a large and substantial volume of business. Irregular route carriers have the right to develop their businesses and that right should not be defeated.

The theory that irregular route carriers were to be accorded treatment different than accorded regular route carriers was expressly negatived in *United States* v. *Carolina Freight Carriers Corp.* (1942), 315 U. S. 475.

The Conference takes the position that none of the eight criteria are peculiar only to regular route carriers because, under the statute there is but one class of common carriers. As between carriers operating over regular or irregular routes there is no difference as to their right to develop a large volume of business; they have exactly the same obligation to the shipping public.

The report of the Commission in this proceeding emphasizes that none of the criteria, with the exception of the observance of definite, published schedules, necessarily is conclusive of regular route operation and, that it is impossible to lay down a general rule for determination of the regular or irregular route character of a motor carrier operation.

The opinion of the District Court sheds no light on this particular feature nor does the report of the Commission. Otherwise stated, neither the opinion of the District Court nor the report of the Commission expressed with particularity the line of demarcation between what, in their opinion, constitutes regular route operations as contrasted with irregular route operations. Both the report and the opinion are vague and indefinite as to employment or use of the eight criteria by carriers holding irregular route authority. To emphasize, it is impossible from either the report or the opinion to determine which, and in what combination, carriers operating over irregular routes may use the eight criteria.

The effect is to leave all holders of certificates authorizing operations over irregular routes, uncertain and indefinite as to the future course of conduct of their trans-

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portation businesses. Because of this uncertainty the carriers operating over irregular routes will, in the future, be forced to conduct their operations at their peril. This is necessarily so because neither the report nor the opinion contain any guide post or standard by which these carriers may determine their future conduct.

It is for these reasons that the Court respectfully is urged to deny the motion to affirm and to permit the parties to be heard by brief and argument so that a clear-cut determination of the issues raised by the decision of the Interstate Commerce Commission may be had. Affirmation of the judgment and decree of the District Court will leave this large group of motor common carriers operating over irregular routes in confusion and uncertainty.

Appellants argue, and the opinion of the District Court states, that irregular route operators have been granted under the "grandfather clause", operating authority more extensive than their actual operations during the "grandfather period". In support of this conclusion the District Court cites the decision in *Alton Railroad Company* v. *United States,* 315 U. S. 15 (1942).

The majority of the outstanding certificates of public convenience and necessity authorizing irregular route operations, were issued by the Interstate Commerce Commission under the so-called "grandfather clause" of the Motor Carrier Act of 1935 (Sec. 206 (a), Part II of the Interstate Commerce Act as amended, title 49 USC Sec. 301-327). Those certificates were granted only after applicants had shown *substantial, continuous operations* and the certificates were delimited in accordance with the proof submitted. (*U. S.* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475)

It is true that in the case of special commodity haulers, transporting a single commodity such as household goods, oil field supplies and equipment or automobiles, the Commission has granted territory over irregular routes broader than the scope of the actual service performed. The *Alton*

case is illustrative of the action of the Interstate Commerce Commission on applications of this type.

However, in the case of diversified or general commodities, the Interstate Commerce Commission followed no such practice or policy. *United States* v. *Carolina Freight Carriers Corp.* (1942), 315 U. S. 475, illustrates how the Commission cut down the territory of such a carrier to that within which *substantial and actual* service could be proved. This situation is even better illustrated in *Howard Hall Co.* v. *United States* (1942), 315 U. S. 495, in which the applicant sought authority to serve a territory within a 100-mile radius of Birmingham, Ala., and the Commission cut the territory down to that within a 10-mile radius. In that case, the Court said:

> "The precise geographical pattern for future operations in the product of an expert judgment based on the substantiality of the evidence as to prior operations, the characteristics of the particular type of carrier, the capacity or ability of the applicant to render the service."

**Conclusion.**

Sec. 208 of the Interstate Commerce Act, Part II in part provides, "That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Relying on this provision and the fact that the certificates issued by the Interstate Commerce Commission contain no service limitation, Conference members have invested hundreds of millions of dollars in their transportation businesses. Additionally, until the report in the *Brady* case was issued by the Interstate Commerce Commission holders of certificates authorizing operations over irregular routes had no intimation that they could not employ any

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or all of the eight criteria or that these eight criteria were considered by any one to be attributes only of regular route operations.

The substantial questions of statutory construction raised by the action of the Commission never have been judicially determined.

Because of the importance to the Conference of obtaining a clear-cut determination, it is submitted that the motion to affirm should not be granted.

Respectfully submitted,

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**Certificate of Service.**

I hereby certify that copy of this brief has been served upon each party indicated below by mailing a copy thereof, postage prepaid, to each.

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MOTION TO AFFIRM FILED IN U. S. DISTRICT COURT, OCTOBER 26, 1947

# IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

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No. 834—Civil

BRADY TRANSFER & STORAGE COMPANY, PLAINTIFF-APPELLANT

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

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## MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint seeking to set aside an order

of the Interstate Commerce Commission. Findings of fact and conclusions of law, and the judgment and decree of the Court, were entered on September 3, 1948. Appeal was allowed on September 25, 1948, and appeal papers were served on October 11, 1948.

The Commission's order, dated February 3, 1947, was made in a proceeding docketed as No. MC-C-246, which was instituted by the Commission upon its own motion following complaints made by several motor carriers aggrieved by loss of business resulting from appellant's unauthorized operations. The Commission's order required appellant to cease and desist from the motor carrier operations which the Commission found that appellant was conducting without appropriate authority from the Commission.

Appellant holds operating authority between the Twin Cities (Minneapolis and St. Paul, Minnesota) and all points in Iowa as a carrier of general commodities *over irregular routes,* but admittedly has no corresponding authority as an operator *over regular routes.*[1]

The facts found by the Commission regarding the nature of appellant's actual physical operations are likewise undisputed.[2] As the Commission found, appellant frankly admitted that it was holding out to the public and was advertising a daily scheduled service between the Twin Cities and Fort Dodge, Iowa, and Spencer, Iowa: and

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[1] Appellant does hold extensive regular route authority between other points than those involved in this case.

[2] See pages 24-27, 55-56 of the Commission's report of February 3, 1947, 47 M.C.C. 23, reproduced as Appendix D to the complaint.

that, except for certain deviations, such scheduled service was in fact being regularly furnished.

The question for decision is whether the facts found by the Commission regarding appellant's operations warranted and justified, as a matter of law,[2] the Commission's determination that appellant, while admittedly holding only irregular route operating authority, had actually converted the character of its operation into that of a regular route carrier, and hence had exceeded its lawful authority and violated Section 206(a) of the Act by operating without authority.

If the Commission was correct in concluding that appellant's operations were not authorized under the terms of the certificate held by appellant, such operations were obviously unlawful and constituted a violation of Section 206(a) of the Interstate Commerce Act, as amended (49 U.S.C. 306(a)), which prohibits operation without an appropriate certificate of convenience and necessity from the Commission.

Appellant contends that the law establishes only one class of common carriers of property, and that irregular route carriers are at liberty to engage in regular route operations between any points within the territory covered by their certificates.

A similar contention was before this Court in *Falwell* v. *United States*, 69 F. Supp. 71 (W.D. Va., 1946), affirmed on motion 330 U.S. 807, in which the present appellant's contention was ex-

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[2] Appellant is precluded, not having offered in evidence before this Court the record made before the Commission, from challenging or attacking the findings made by the Commission. *Mississippi Valley Barge Line Company* v. *United States*, 292 U.S. 282, 286 (1934).

plicitly rejected by the district court in the language quoted in the note below.[4] One of the questions presented in that case and discussed in the briefs before this Court was whether the Commission committed error when it recognized and applied the distinction between regular and irregular route service. The Government's position, as set forth in its motion to affirm in the *Falwell* case, was that in giving effect to the distinction the Commission was following a construction of the statute approved by this Court in *United States* v. *Maher*, 307 U.S. 148 and *United States* v. *Carolina Freight Carriers Association*, 315 U.S. 475, 480. In the *Falwell* case, appellant herein, the Brady Com-

[4] This argument, as we understand it, amounts in the end to this: That a certificate for irregular-route operations over a specified territory carries no restrictions as to the highways (or routes) over which the carrier may operate within the territory or between the points specified in his certificate; and that the carrier is likewise under no prescription or restriction as to schedules of service or quantity or quality of service. And that, therefore, the holder of a certificate for irregular-route operations may, if he choose, utilize his rights or any part thereof to establish regularly scheduled operations over any highway within his territory—or in other words, to conduct his operations in the form of regular-route operations between any points covered by his certificate. And this, even if by so doing he parallels the service rendered by any number of other carriers holding regular-route certificates for operations between the same points.

With this contention we cannot agree. To do so would grant to holders of irregular-route certificates a free hand to operate as they chose; to operate irregularly over such parts of the territory as they might choose and to establish regular-route operations where they so desired. An irregular-route certificate would be authority to conduct either or both forms of operations at the carrier's choice. It would nullify the distinction between regular and irregular route carriers and would nullify the power of the Commission to establish and maintain comprehensive and efficient service adjusted to the public need and free from destructive competition between carriers (69 F. Supp. at 77).

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pany through its present counsel, filed a brief as *amicus curiae* in this Court in opposition to the motion to affirm. That brief declared that the Brady Company's interest in the *Falwell* case resulted from the decision of the Commission in the present case; the brief indicated clearly that affirmance of the Commission's order by this Court in the *Falwell* case would be dispositive of the *Brady* case as well. As has been noted, this Court affirmed the decision upholding the Commission's order on motion and without opinion.

In the circumstances, a detailed discussion of the merits of the case in order to show the complete lack of basis for appellant's arguments seems unnecessary. The statutory provisions and the authorities are analyzed, in some detail, in the opinion of the Commission, attached to the complaint herein as Appendix D, pp. 9 *et seq.* (47 M.C.C. 31).

In short, various sections of the statute, and particularly Section 203 (a) (14) (49 U.S.C. Sec. 303 (a) (14)) indicate clearly that the Commission was to have power to distinguish between regular and irregular routes. See, in addition, Sections 208 (a), 207 (a), (49 U.S.C. Sec. 308 (a), 307 (a)). This Court recognized this in the *Maher* case, 307 U.S at 155. Although the *Maher* case was concerned with passenger transportation, the statutory provisions clearly apply to both transportation of passengers and property.

The distinction between regular and irregular operations has long been recognized in the industry. This appears from the authorities cited with approval by this Court in the *Maher* case

(307 U.S. at 155 n). *Motor Bus and Motor Truck Operation,* 140 I.C.C. 685, 699; *Coordination of Motor Transportation,* 182 I.C.C. 263, 274; *Coordination of Motor Transportation,* Sen. Doc. No. 43, 72d Cong., 1st Sess., pp. 34-35; *Regulation of Transportation Agencies,* Sen. Doc. No. 152, 73d Cong., 2d Sess., pp. 176, 191-192.

It is further to be noted that irregular route operators have been granted under the "grandfather clause" more extensive operating territory than the actual transportation service performed by them during the "grandfather" period would have warranted, simply because the Commission, with the approval of the courts, took account of the "transportation characteristics" of irregular route operation in determining the geographical scope of the operating authority to be granted. *Alton Railroad Company* v. *United States,* 315 U.S. 15, 21 (1942). The transportation characteristics of irregular route carriers are perhaps most strikingly shown in the case of household goods carriers, to which the Court refers in the *Alton* case. Thus in the case of some carriers of household goods, authority has been granted to serve an extensive area (embracing two entire states), notwithstanding the fact that no actual transportation was performed within such states during the "grandfather" period. *Aero-Mayflower Transit Company, Inc., Common Carrier Application,* 20 M.C.C. 633, 636-7 (1939). Similar liberality has been shown in the case of other irregular route carriers, the Supreme Court having approved the Commission's practice of considering the "characteristics of the transportation

service" rendered, in considering the territorial scope of the operations to be authorized. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 481-2 (1942).

Having thus obtained a larger territory than their actual transportation service during the "grandfather" period warranted, because the Commission took into account "the characteristics of irregular route carriers and their role in the national transportation system" (*Carolina* case, *supra*, p. 482), when determining the extent of their certificated territory, the irregular route carriers such as appellant are indeed seeking to "eat their cake and have it too" when they endeavor to expand their certificates into an authorization to engage in regular route operation whenever and wherever they see fit, to the detriment of regular route carriers who during the "grandfather" period had actually rendered regular service to the localities along the routes involved.

Such a result would do violence to the statutory purpose of preserving "substantial parity" between a carrier's certificated authority and its prior bona fide service during the "grandfather" period. *Alton* case, *supra*, 315 U.S. at p. 22 *Carolina* case, *supra*, 315 U. S. at p. 481.

Although it is recognized that the decision in this case is of importance to holders of irregular route certificates generally, it is evidence that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment and decree of the District Court should be affirmed.

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No. 397. BRADY TRANSFER & STORAGE CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of Iowa. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. *Rex H. Fowler, John S. Burchmore, Robert N. Burchmore* and *Nuel D. Belnap* for the Brady Transfer & Storage Co.; and *James E. Wilson* for the Irregular Route Common Carrier Conference of the American Trucking Assns., Inc., appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States et al., appellees. Reported below: 80 F. Supp. 110.